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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;

Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

On Appeal From the United States District Court for the Eastern District of Wisconsin

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BRIEF OF APPELLEES SLEEPY'S, INC., KAUZRICH and WIGINTON

STATUTES INVOLVED

280.09 Bawdyhouses declared nuisances. Whoever shall erect, establish, continue, maintain, use, occupy or lease any building or part of building, erection or place to be used for the purpose of lewdness, assignation or prostitution, or permit the same to be used, in the state of Wisconsin, shall be guilty of a nuisance and the building, erection, or place, in or upon which such lewdness, assignation or prostitution is conducted, permitted, carried on, continued or exists, and the furniture, fixtures, musical instruments and contents used therewith for the same purpose are declared a nuisance, and shall be enjoined and abated.

280.10 Disorderly house, action for abatement. Whenever a nuisance, as defined in s. 280.09, exists the district attorney or any citizen of the county may maintain an action in the circuit or county court in the name of the state to abate the nuisance and to perpetually enjoin every person guilty thereof from continuing, maintaining or permitting such nuisance. All temporary injunctions issued in such actions begun by district attorneys shall be issued without requiring the undertaking specified in s. 268.06, and in actions instituted by citizens it shall be discretionary with the court or presiding judge to issue them without such undertaking. . . .

* * *

944.20 Lewd and Lascivious behavior. Whoever does any of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ.

944.21 Lewd, obscene or indecent matter, pictures and performances. (1) Whoever intentionally does any of

the following may be fined not more than $5,000 or imprisoned not more than 5 years or both:

(d) Advertises, produces or performs in any lewd, obscene or indecent performance.

* * *

947.01 Disorderly conduct. Whoever does any of the following may be fined not more than $200 or imprisoned not more than 90 days or both:

(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; . . . .

STATEMENT OF THE CASE

Appellees are licened tavernkeepers. They own and operate taverns which are licensed by the City of Kenosha, Wisconsin to sell intoxicating liquors. (R. 201)[1] Each tavernkeeper has an investment in excess of $20,000 in his business. (R. 207) Termination of their liquor licenses would deprive each operator of the authority to sell intoxicating liquors for consumption on the premises by the glass, and would result in a major loss of income. (R. 207-208)

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[1] This is an appeal by the State of Wisconsin from the judgments in nine separate cases before the United States District Court for the Eastern District of Wisconsin. The State of Wisconsin filed a notice of appeal to this Court in each of the nine cases. However, only the records in two of the cases (*Misurelli, et al. v. City of Racine,* No. 71-C-316 and *Sleepy's, Inc. v. City of Kenosha,* No. 71-C-332) were transmitted to the Clerk of this Court. The records in the other seven cases are virtually the same in content as the record now on file.

This brief is submitted on behalf of appellees, Sleepy's, Inc., Fred Kauzrich and Charles Wiginton. Therefore, this Statement of the Case relates only to the procedures used by the City of Kenosha. Again, however, the disputes with the City of Kenosha are based upon essentially the same facts found in the cases involving the City of Racine and the Racine appellees. The references to the record in this brief will be confined to the cases involving the City of Kenosha unless otherwise noted.

Appellees had been licensed individually by the City of Kenosha under "Retail Class B" licenses to sell liquor (other than beer or malt beverages) from July 1, 1970 through June 30, 1971. (R. 202)[2] During this license period each of the Kenosha tavernkeepers featured female professional dancers for the entertainment of their patrons. The dancers often presented performances featuring nude or semi-nude dancing. (R. 207)[3]

Prior to April 15, 1971, as required by state law, the tavernkeepers submitted appropriate applications to renew their "Retail Class B" liquor licenses for the time period July 1, 1971 to June 30, 1972. The City of Kenosha stipulated that the applications revealed no legal disabilities which would prevent the tavernkeepers from holding such licenses.[4] (R. 202)

Finance Committee Meetings

During the week of May 10, 1971 each of the tavernkeepers received a notice specifying the time and place of a special meeting of the city finance committee (re-

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[2] A separate license must be obtained to sell beer or other fermented malt beverages. §§176.05(10)(b) and 66.054, Wis. Stats. (1971).

[3] At no time during these license disputes had the City of Kenosha alleged, nor had any court found, that these dancers had performed in an obscene performance (§944.21[1][b], Wis. Stats. [1971]), or in a lewd and lascivious manner (§944.20[2], Wis. Stats. [1971]). (R. 207)

[4] §176.04(9), Wis. Stats. (1971) provides in pertinent part: "WHERE AND TO WHOM LICENSES NOT GRANTED. No license or permit shall be granted to any person or persons under the age of 18 years for the sale of any such intoxicating liquors, or to any person who is not of good moral character and a full citizen of the United States and of this State and who has not resided in this State continuously for at least one year prior to the date of filing the application; nor shall any such license be granted or issued to any person who has habitually been a petty law offender, or has been convicted of an offense against the laws of the State punishable by imprisonment in the State prison. . . ."

ferred to in the notice as the "license committee"). The notice simply stated that the "committee wishes to *interview* you regarding the license for which you have applied." [Emphasis supplied.] (R. 202) The notice did not state that the committee had received complaints about the operation of the taverns; nor did it state that a hearing would be conducted to air such complaints; nor did it state that the purpose of the meeting would be to formulate recommendations on the applications to be submitted to the Kenosha Common Council.

On May 18, 1971 (the date specified in the notice), the committee, composed of six city councilmen, convened. No interview of any of the tavernkeepers ever took place. (R. 203) Instead, the committee heard from citizens who spoke against renewal of the liquor licenses for those taverns where nude and semi-nude dancing had been featured. Six applicants (appellees Bruno, Bleashka, Sleepy's, Inc., Kauzrich, Stenzel and Wiginton) were separated out from a total of 154 license applicants and their applications were discussed as a group, rather than individually. (R. 203, 280) None of the comments of the speakers was made under oath. No speaker was allowed to be cross-examined. Some of the speakers complained of events which they had not witnessed but which they had heard about from other persons. An attorney for the six applicants was present and was permitted to speak. He did not ask to cross-examine any of the speakers. No record was made of the statements or of the nature of the complaints. (R. 203, 209) At the conclusion of the meeting the attorney agreed on behalf of the tavernkeepers to meet privately on May 21, 1971 with the chief of police, the city attorney of Kenosha and the finance committee to discuss the legal rights and duties of the committee and to reach a compromise agreement

which would permit the committee to recommend renewal of the licenses. (R. 278)

On May 19 the attorney for the tavernkeepers was informed that the meeting would be public, rather than private. On May 21 the finance committee reconvened and the chairman announced that the purpose of the meeting was to hear statements from citizens on the six tavernkeepers' applications for renewed licenses. The mayor of the City of Kenosha gave an address which was followed by a brief statement by the attorney for the tavernkeepers. The applicants and their attorney then left the meeting. (R. 204) Thereafter, the finance committee voted to recommend to the common council that all six license applications be denied. (R. 205) At no time prior to the May 21 meeting were the applicants or their attorney told that complaints would be heard concerning their applications; nor were they told the nature of the complaints (R. 280); nor were they given prior notice that a vote would be taken at the May 21 meeting on their applications. (R. 204) Again, no record was compiled of the statements made at the hearing. (R. 210)

Common Council Meetings

On June 7, 1971 the Kenosha Common Council heard the recommendations of the finance committee regarding the applications of the six tavernkeepers. No specification of the reasons for the committee's recommendations was given to the tavernkeepers or their attorney prior to the council meeting. (R. 280) The chairman of the finance committee and one other member of the committee reported its recommendations and moved to deny the renewal of the licenses of the six tavernkeepers. The committee's recommendations as to each applicant were based

on the following reasons which were reported to the council:

"1. The licensee, through his actions in general in operating his establishment has defiled the reputation of the City of Kenosha areawise, statewise [*sic*] and nationally.

"2. This person helped furnish an atmosphere conducive to the flourishing of prostitution, creating a bad environment and setting improper moral standards for the children in this community.

"3. Since the inception of the type of entertainment allowed by the licensee, the law enforcement problem has increased and the Police Department records indicate that parking and litter problems around the area and crimes of a violent nature escalated in areas of our city.

"4. The Chief of Police, head of the City's Police Department, recommends denial based on the fact that topless and bottomless entertainment as featured in the licensee's establishment is conducive to the lack of respect for law and authority as it relates to our community.

"5. Increased police surveillance of establishments of this type requires more man hours and thus proves costly to the taxpayers of the city.

"6. The type of entertainment conducted by the licensee promotes the 'wide open city' effect and is not attractive to new industry who may consider coming into the community.

"7. Entertainment, which has been allowed in this establishment, attracts an undesirable element from other cities who come to view the same." (R. 211-212)[5]

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[5] The reasons cited by the finance committee to the council for denying the applications are surprisingly similar to the reasons cited by the Racine license committee in its report and recommendation to the Racine common council. Compare (R. 211) with (A. 35-36).

Prior to voting on the committee's recommendations the council suspended its rules to hear statements from persons other than council members. There were statements by the attorney for the applicants, by the chief of police and by three private citizens.[6] The common council then proceeded to vote on the applications, and in each instance denied the application to renew the tavernkeeper's liquor license. As required by §176.05(8), Wis. Stats. (1971), the council stated its reasons for rejecting the application in each instance. In each case the council based its action on the seven reasons articulated by the finance committee in its report. (R. 211-212)

On June 21, 1971 the common council held another meeting. It decided to reconsider the action taken on June 7, in light of a signed agreement by the tavernkeepers that (1) there would be no more topless, bottomless dancing; (2) female entertainers would wear bottoms and tops when on licensed premises; (3) there would be no nude male entertainers; and (4) the injunction pending in federal court would be dismissed upon enactment of a new cabaret ordinance. (R. 213) The council again suspended its procedures to hear statements from non-

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[6] The minutes of the clerk reflect that the attorney made the following statement:

> "Attorney Schwartz concluded his statement stating that his 6 clients feel they have done no wrong — that his 6 would throw in the towel and agree, in order to continue in business, to clothe the go-go dancers, and upon city passing a new cabaret ordinance would dismiss action pending in Federal Court temporarily enjoining the city."

The minutes further reflect the following statements::

> "Police Chief, Robert L. Bosman, was then called upon to make a statement. He was for denial, stating that denial would be for the common good of the community. That this type of tavern has affected the neighbors and their living conditions, fights in the

council members. Eight persons were heard, three in favor of denying the licenses and five in opposition. Again, there is no record of the content of the statments. The mayor of Kenosha then took the floor and stated that if the licenses were reinstated, he would veto the council's action. (R. 213) The council then voted and reaffirmed the denial of the six applications.

The tavernkeepers then brought this action in federal district court on June 30, 1971, alleging that they were denied due process of law due to a lack of notice and hearing prior to the city's action, that the statutes and procedures were overly vague, and that the acts of the city deprived the tavernkeepers of their rights of free speech and expression. A temporary restraining order was entered on June 30, 1971, which required that the licenses be reinstated until further order of the court. (R. 144) The restraining order was subsequently continued, and the single judge requested the convening of a three-judge court in light of the challenge to the state

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(continued)

neighborhood, cans and litter strewn about, young children have been seen viewing the entertainment through windows and cracks in doors.

. . .

"Mr. John O'Day repeated the request of the Knights of Columbus as set forth in their petition.

"Mr. Richard Bisciglia . . ., spoke on the issue stating that he lives close to taverns in question. His neighborhood has degenerated since the inception of topless and bottomless entertainment due to litter, fights, filthy language. He recalled an incident that on June 6, 1971, men from Illinois went into one of the taverns, came out about one half hour later and one exposed himself in broad daylight on a public street, while using filthy language. At night, both he, his wife and children have to listen to the obscene language used by patrons.

"Sandra O'Day stated that she feels this type of entertainment affects children.

"After the public hearing was ended, members of council expressed their individual feelings on the issue." (R. 211)

statute regulating liquor licenses. *Bruno v. City of Kenosha,* 333 F. Supp. 726 (E.D. Wis. 1971), *et seq.* The facts were agreed upon by the parties following requests for admissions and both sides filed motions for summary judgment. Thereafter, on August 2, 1972 a three-judge court entered its decision which is the subject of this appeal. *Misurelli v. City of Racine,* 346 F. Supp. 43 (E.D. Wis. 1972). The decisions concerning the Kenosha tavernkeepers are unreported but merely incorporate by reference the reported decision in *Misurelli.* (Jurisdictional Statement, A. 129-130).

SUMMARY OF ARGUMENT

The Wisconsin statutes which regulate the issuance of municipal, retail liquor licenses require that tavernkeepers renew their licenses annually. Under the statutory procedures a tavernkeeper must submit an application to renew his license to local municipal authorities before April 15 of each year, and the authorities must grant or deny his application by June 15. By statute, any renewal applicant whose application is denied must be informed of the reasons therefor. The law as construed by the Wisconsin Supreme Court entitles each applicant to a legislative-type hearing before his application is considered. The municipality is required to give applicants notice of the meetings at which the applications will be determined and also is required to grant each applicant an opportunity to speak in support of his application. However, the law, as construed, does not require prior notice of the reasons why the license may be denied so the applicant can prepare a defense, and does not afford the applicant an adversary hearing where witnesses can be sworn, confronted and cross-examined and a verbatim record is prepared.

Appellees are tavernkeepers whose liquor licenses were not renewed because they featured performances by nude and semi-nude dancers. According to city officials, these entertainment programs harmed the city's reputation, encouraged prostitution, set poor moral standards for children, caused litter and parking problems, escalated crimes of violence, discouraged new industry, and attracted undesirable persons. The tavernkeepers never were given advance notice that these were the reasons why the city proposed to deny their applications. The appellees were denied the opportunity to cross-examine the persons making these accusations. None of the statements by witnesses at such license meetings was made under oath and no verbatim record was made of their statements.

The acts of the city deprived the tavernkeepers of "liberty" and "property" within the meaning of the due process clause so that constitutional protections of procedural due process were applicable. Because the licensees were publicly accused of immoral and criminal-type conduct, they had a strong interest in refuting the charges. Their "liberty" had been restricted because their reputations in the community were impugned. Also, the nonrenewal of their licenses on grounds of bad moral character foreclosed similar tavernkeeping opportunities to them elsewhere in the State. Appellees were also deprived of "property" because applicants for renewed liquor licenses are protected by many procedures which do not protect initial applicants. A licensee seeking renewal has a right to stated reasons if his application is denied; and he has greater rights of review over any nonrenewal decision. Moreover, the interest of each appellee in renewing his liquor license constitutes "property" because of his investment of over $20,000 in his business property.

Because "liberty" and "property" were affected by the non-renewal decisions, procedural due process should have been afforded each licensee. The tavernkeepers' interests in defending their reputations, in protecting their property investments, in pursuing their chosen careers, and in presenting entertainment which is protected under the First Amendment, far outweighed the interests of the State (such as increased costs and inconvenience) in providing only a summary, non-adversary adjudication of their applications. Further, the State has an interest in ascertaining the truth concerning the character of the applicants and the nature of their tavern businesses so that persons of good standing are granted liquor licenses. The public has an interest in full public hearings so that corruption does not infect municipal governments in the dispensation of license privileges.

The hearings which were held failed to offer the tavernkeepers "minimal procedural safeguards." Only if they had been given advance notice of the charges against them could they have adequately defended themselves and their licenses. Because witnesses were not under oath and were not subjected to cross-examination, all sorts of vague and unsupported charges were made. The licensees were entitled to a full hearing *before,* not after, the city officials ruled on their applications. They could not have received an adequate hearing in court on review because such review is not a new hearing on the merits. It only provides a remedy when the discretionary, non-renewal decision is arbitrary or capricious.

The federal court which found the renewal procedures to be constitutionally defective should not have abstained from hearing this dispute. The state statutes which were challenged were unambiguous and had been authorita-

tively construed. Furthermore, no state court actions were pending in these disputes. So the federal court did not in any way interfer with pending state court litigation.

ARGUMENT

I. A TAVERNKEEPER'S INTEREST IN REFUTING OFFICIAL ACCUSATIONS OF IMMORAL OR CRIMINAL CONDUCT AND IN CONTINUING HIS ANNUAL LIQUOR LICENSE CONSTITUTES "LIBERTY" AND "PROPERTY" UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. A Refusal to Renew a Tavernkeeper's Liquor License Because of Official Accusations of Immoral or Criminal Conduct Results in a Deprivation of "Liberty" Within the Meaning of the Due Process Clause of the Fourteenth Amendment.

The tavernkeepers assert that the Kenosha officials violated their right to procedural due process of law when city officials rejected the renewal applications. They recognize that before concepts of due process come into play, they must first demonstrate that their interests affected constitute "liberty" or "property" which is protected under the Fourteenth Amendment. This was the analytic approach announced in *Board of Regents v. Roth,* 408 U.S. 564, 570-571 (1972):

> "But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake

> . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[7] (Emphasis in original.)

The "liberty" of the Kenosha tavernkeepers was substantially impaired by the action of the Kenosha officials in two significant respects. First, the chief of police, the finance committee and the common council all leveled accusations of undesirable, immoral and criminal conduct against the tavernkeepers for their entertainment policies. The charges which were directed against the tavernkeepers were made in public; by their very nature they were calculated to damage the reputation and standing of the tavernkeepers in their own community. Second, the refusal to renew appellees' liquor licenses because they were contributing to undesirable, immoral and criminal conduct in the city, necessarily foreclosed the tavernkeepers from finding other business opportunities elsewhere in the state. After their license renewals were refused for the reasons stated, it would have been virtually impossible for the tavernkeepers to move to another section of the state and readily obtain a liquor license, both because of the statutory "good moral character" requirement and the statutory April 15 time restriction on license applications.

It was a matter of public record that the chief of police recommended rejection of the applications because some of the entertainment in his opinion was "conducive

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[7] *Accord, Morrissey v. Brewer,* 408 U.S. 471, 481 (1972): "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment . . . Once it is determined that due process applies, the question remains what process is due"; *Fuentes v. Shevin,* 407 U.S. 67, 84 (1972): "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection."

to the lack of respect for law and authority as it relates to our community." (R. 211) At the June 7 common council meeting the police chief further charged that "this type of tavern has affected the neighbors and their living conditions, fights in the neighborhood, cans and litter strewn about, young children have been seen viewing the entertainment through windows and cracks in doors." (R. 211) The license committee in its recommendations to the common council charged that the licensees had "defiled the reputation of the city," that they had furnished "an atmosphere conducive to . . . prostitution . . . setting improper moral standards for the children in this community," that law enforcement problems had increased and that police department records indicate "that parking and litter problems around the area and crimes of a violent nature [have] escalated. . . ." The committee also charged that the entertainment "is not attractive to new industry . . . coming into the community," and that it "attracts an undesirable element from other cities. . . ." (R. 211)

Further, at both finance committee meetings and both common council meetings several private citizens advocated that the license applications be denied. While the nature and content of their statements is unknown because no recording or transcript was prepared, it would not be unfair to assume that they were also accusing the tavernkeepers of improper, immoral or illegal conduct.

The public charges against the tavernkeepers which preceded the denial of their license applications clearly affected the "liberty" of each licensee. In *Board of Regents v. Roth, supra,* at 573, this Court expressly noted that official accusations of dishonesty *or immorality* neces-

sarily infringe on an individual's liberty or freedom under the Fourteenth Amendment.

> "There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case." *Id.*[8]

While this Court found that the nonrenewal of Professor Roth's contract did not implicate a "liberty" under the Fourteenth Amendment, that was because the university had not given, and was not required to give, a reason for the nonrenewal. *Id.* at 567. On the other hand, the Kenosha common council publicly acknowledged its reasons for the nonrenewal of the tavernkeepers' licenses. Moreover, it was required to do so by statute. Section 176.05(8), Wis. Stats. 1971, provides in pertinent part:

> "No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

While the licensees did not deny that they frequently offered topless or nude dancing for entertainment, they

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[8] *Accord, Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971): "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential;" *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1952): "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." (Frankfurter, J. concurring).

certainly questioned the official accusations against them that this entertainment defiled the reputation of the city, furnished an atmosphere conducive to prostitution, set improper moral standards for children, increased parking and litter problems, escalated crimes of a violent nature in the city, and attracted undesirable elements from other cities. Though the accusations were noticeably vague and unspecific, nevertheless they exposed the proprietors "to public embarrassment and ridicule." *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971).

The Kenosha nonrenewal procedures infringed on the licensees' "liberty" in a second way. The nonrenewal decision substantially impaired the freedom of each tavernkeeper to find similar business opportunities elsewhere in the state. Because the Kenosha officials essentially rejected the applications on the ground that the licensees were contributing to undesirable, immoral and criminal activity in the city, the tavernkeepers were branded as persons of bad moral character. If they had moved to other towns or cities in Wisconsin and had sought liquor licenses from those municipalities, they no doubt would have had to confront the State statute which disqualifies persons "not of good moral character" from holding liquor licenses. §176.05(9), Wis. Stats. (1971). In addition, even if another Wisconsin town or city had been willing to ignore Kenosha's labels of immorality and criminality, appellees would have missed the April 15 deadline imposed by the licensing statute for submitting applications. Section 176.05(8), Wis. Stats. (1971), requires the local authority to grant or deny a liquor license application only if it is presented before April 15. While the town or city may grant licenses which are applied for at any other time, an applicant can compel the locality to grant or deny his application only if it is filed before April 15.

In the present situation appellees would have had no assurance that an application for a license from some other Wisconsin municipality would be acted upon until the following year since the Kenosha applications were not denied until June. Thus, if any of the tavernkeepers had moved to another municipality to re-establish a tavern business, he would have faced the prospect of having to wait at least until April of the following year to get his application heard; or, even worse, he might never be entitled to hold a liquor license because the Kenosha officials stigmatized him as a person of bad moral character.[9]

In *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), this Court stated: "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life. . . ." More recently, in *Board of Regents v. Roth,* 408 U.S. 564, 573-574 (1972), the Court noted that Professor Roth's liberty would have been affected if it had been likely that he had been barred from employment in other state universities.

> "Similarly, there is no suggestion that the State in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not involve any regulations to bar the respondent from all other

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[9] The consequences of nonrenewal when based upon charges of immorality can be as severe as the consequences of the revocation of a liquor license. Under §176.12, Wis. Stat. (1971) if a license is revoked "no other license shall be granted to such person within 12 months of the date of its revocation." Yet a licensee facing revocation is given a full panoply of procedural protections, including prior notice, and a full adversary hearing. §176.12, Wis. Stat. (1971).

public employment in State universities. Had it done so, this, again, would be a different case." *Id.*[10] Appellees submit that theirs clearly is an example of "the different case."

B. A Tavernkeeper's Interest in Continuing His Liquor License is a Form of "Property" Within the Meaning of the Due Process Clause of the Fourteenth Amendment.

It has been asserted that a tavernkeeper's interest in renewing his annual liquor license does not constitute "property" under the due process clause because the license expires automatically, and there is no continuing entitlement beyond the year term. In *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 523, 157 N.W. 2d 568 (1968), the Wisconsin Supreme Court stated: "And because the license is generally of only one year's duration and must be renewed, it has been considered more in the nature of a privilege than a vested or a property right." This analysis overlooks the fact that Wisconsin offers procedural protections for a tavernkeeper seeking to continue his license which are unavailable to a person making his first application. By statute, a renewal applicant has a right to notice of the reasons why the license was not renewed. §176.05(8), Wis. Stats. (1971). An initial applicant, on the other hand, has no statutory right to be informed of the reasons why his application was denied. The renewal applicant has greater appellate remedies as well: because the reason for the denial of a renewal application is a matter of public record, a review-

[10] *Accord, Cafeteria Workers v. McElroy,* 367 U.S. 886, 898 (1961): "Finally, it is noted that this is not a case where government action is operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. . . . There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else."

ing court is better able to determine whether the licensing authority has abused its exercise of discretion. If an initial license applicant seeks review of the denial of his application, the reviewing court has no statement of reasons to consider, and thus the licensing authority is left with apparently unfettered discretion. The renewal applicant, on the other hand, has a "more adequate legal remedy." *State ex rel. Boroo v. Town Board,* 10 Wis. 2d 153, 160, 102 N.W. 2d 238 (1960).

> "It seems to us that what the legislature attempted to do by enacting the portion of ch. 42, Laws of 1941, [§176.05(8), Wis. Stats. (1971)] which required the reasons for denial of an application for renewal license to be entered upon the clerk's minutes, was to enable the courts to review such stated reasons and to determine whether the refusal of a license on such grounds constituted an arbitrary or capricous act." *Id.* at 160.

The *Boroo* decision also states that a renewal applicant, if successful on review, can obtain a court order compelling the renewal of his license, while the same court, finding an abuse of discretion in denying an initial license application, can only send the matter back to the licensing authority for further proceedings.

> "If the reviewing court should conclude that the stated reasons did constitute arbitrary or capricious action, and therefore an abuse of discretion, there would exist no reason why the matter should be sent back to the licensing authority to again exercise its discretion. Under such a situation the licensing authority should be held to have exhausted its discretion and the court should direct the issuing of the license unless some other statutory impediment prohibited the same." *Id.* at 160-161.

Thus, contrary to the situation in *Board of Regents v. Roth, supra,* at 578, where Roth's employment contract

"made no provision for renewal whatsoever," a licensed tavernkeeper is protected by statutory provisions and Wisconsin case law governing procedures for renewal. Furthermore, the fact that Wisconsin has eligibility standards under §176.05(9) specifying who may not be granted a liquor license also gives the licensed tavernkeeper a type of "property" interest. In *Board of Regents v. Roth, supra,* at 576, this Court noted that under *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926), eligibility rules alone may give an applicant a sufficient property interest to invoke procedural protections under the due process clause.

> "[T]he existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied.... [T]he Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' "

When a tavernkeeper seeks to renew his liquor license, he has more than just a job or employment at stake. The State has acknowledged that each of the appellees has an investment in his tavern in excess of $20,000. Thus, it was acknowledged in *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 524, 157 N.W. 2d 568 (1968) that: "Of course, normally in a renewal situation there are more equities in favor of granting the license. . . ." Although appellees may be compared to Professor Roth in that they sought to renew their licenses to continue their employment, they differ from Roth in that no underlying investment was in jeopardy in his situation. For example, if the university had encouraged Roth to make a personal investment in a research project requiring several years' work or, had encouraged him to use

his own funds to purchase or lease a building for a political science institute, then Roth's interest in the renewal of his employment contract would have acquired added "property" characteristics. Where the licensee is encouraged by the State to make a property investment for the exercise of the license privileges, the licensee clearly has justification for asserting a "property" interest in the renewal of the license.

The definite property aspects of licenses which are limited to terms should not be overlooked merely because they expire on a specified date. For example, if medical licenses and lawyers' licenses expired annually, would the State be so quick to suggest that doctors and lawyers did not have a sufficient "property" interest in renewing their licenses as to afford them due process? Or if the State limited welfare eligibility or public housing eligibility on a monthly basis, so that entitlements would have to be renewed every month, would the State then argue that welfare recipients and public housing tenants have an insufficient "property" interest to require notice and hearings prior to non-renewal? The fact that the privilege or license expires, and is not a self-continuing interest, does not detract from its value or "property" aspects.

Finally, this Court's reference in *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 9 (1970) to the decision in *Hornsby v. Allen*, 326 F. 2d 605 (5th Cir. 1964), strongly suggests that a "right to obtain a retail liquor store license" is a form of "property" under the Fourteenth Amendment. For the reference to *Hornsby* was included in an enumeration by the Court of interests which could not be denied without "relevant constitutional restraints." *Id.*

II. DUE PROCESS OF LAW REQUIRES THAT A MUNICIPALITY MAY NOT DENY AN APPLICATION FOR RENEWAL OF A LIQUOR LICENSE UNLESS THE APPLICANT IS GIVEN ADVANCE NOTICE OF THE REASONS WHY HIS APPLICATION MAY BE DENIED AND IS GRANTED AN ADVERSARY HEARING WHERE A VERBATIM RECORD OF SWORN TESTIMONY IS MADE AND WHERE HE MAY CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

A. A Tavernkeeper's Interests in Clearing His Name of Charges of Immoral or Criminal Conduct and in Renewing His Liquor License Far Outweigh Any Interest the Municipality May Have in Obtaining a Summary, Non-Adversary Adjudication of His Renewal Application.

The concept of procedural due process of law is a flexible one. Depending upon the various private and governmental interests involved, either greater or lesser procedural safeguards may be required. Not all situations calling for procedural safeguards call for the same kind of procedure. An acknowledged formula for determining what safeguards are required in a given situation was stated in *Cafeteria Workers v. McElroy* 367 U.S. 886, 895 (1961):

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of

> the private interest that has been affected by governmental action." [11]

Turning first to a consideration of the private interests, the tavernkeeper has several substantial reasons requiring advance notice of the accusations against him and a full hearing thereon. Where a denial of his liquor license renewal is contemplated because the municipality has received complaints of undesirable, immoral or criminal conduct in connection with the operation of his tavern, as is the case here, the tavernkeeper clearly has an interest in refuting those charges and in clearing his name and reputation in the community. In *Board of Regents v. Roth,* 408 U.S. 564, (1972), the Court stated:

> "The State in declining to rehire the respondent did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. * * * In such a case, due process would accord an opportunity to refute the charge before University officials."
>
> "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." *Id.,* at n. 12.

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[11] *See also, Board of Regents v. Roth,* 408 U.S. 564, 570, (1972); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972); *Stanley v. Illinois,* 405 U.S. 645, 650 (1972); *Groppi v. Leslie,* 404 U.S. 496, 500 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971); *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971); *Goldberg v. Kelley,* 397 U.S. 254, 267 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340 (1969); *Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960).

In *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971), the same reason was stated:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." [12]

A second substantial private interest which demands adequate due process for the tavernkeeper is his investment in his tavern. Each of the appellees has invested more than $20,000 in his tavern operation. The licensees either own or lease the tavern premises. When the liquor license is not renewed, the tavern operator is left out in the cold, holding his property or his lease without any right to use his premises for its intended purpose. *See, e.g., Marquette Savings & Loan Asso. v. Twin Lakes,* 38 Wis. 2d 310, 156 N.W. 2d 425 (1968); *State ex rel. Higgins v. Racine,* 220 Wis. 107, 264 N.W. 490 (1936).

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[12] It should be noted that a tavernkeeper's interest in refuting charges extends not only to accusations concerning his own conduct, but also the conduct of those who work for him. For under Wisconsin law, a tavernkeeper is liable for the actions of his agents and employees whether or not he had knowledge of those acts or was present during their performance. Thus, a charge that his entertainers performed in an obscene manner or that his employees engaged in after-hours liquor sales, or sales to minors, are not only charges against the employees but against the licensee as well. Such charges affect his ability to retain his liquor license and in instances of criminal conduct he may be held strictly, though vicariously, liable. *See, e.g., State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 525, 157 N.W. 2d 568 (1968); *City of Milwaukee v. Piscuine,* 18 Wis. 2d 599, 119 N.W. 2d 442 (1962); *State v. Grams,* 241 Wis. 493, 6 N.W. 2d 191 (1942); *State ex rel. Higgins v. Beloit,* 74 Wis. 267, 42 N.W. 110 (1889).

In *Misurelli v. City of Racine,* 346 F. Supp. 43, 50 (E.D. Wis. 1972), the district court below recognized the substantial private interests of each of the appellees:

> "Denial of a liquor license renewal, as in the cases before us, involves a greater amount of potential damages than are at issue in most civil litigations and in many criminal actions. It is not unimportant to note that were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the necessary $10,000 controversy requirement of Title 28 U.S.C. §1331. In light of this substantial interest on the part of each of the plaintiffs and balanced against the needs of Racine and Wisconsin for an abbreviated hearing process, we find that due process demands the minimal procedural safeguards set forth above."
>
> "The stake of the plaintiffs is both their occupations and their investments for denial of the renewal of a liquor license bars them not only from selling liquor, but substantially impairs the value of their taverns" *Id.* at 48.

A third private interest calling for adequate procedural safeguards is the tavernkeeper's claim to pursue his chosen career as a tavern operator. As noted above, it would have been virtually impossible for appellees to move to other sections of the state and readily obtain liquor licenses from different municipalities, both because of the statutory "good moral character" requirement and the statutory April 15 time limit on license applications. So when the liquor licenses were not renewed, the tavernkeepers were effectively deprived of their jobs. In *Board of Regents v. Roth,* 408 U.S. 564, 574 (1972), this Court noted:

> "The Court has held, for example, that a State in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities

> 'in a manner . . . that contravene[s] due process,' . . . and, specifically, in a manner that denies the right to a full prior hearing."

Likewise, because appellees were deprived of their chosen trades when their liquor licenses were not renewed, their cases are distinguishable from the situation in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961):

> "What . . . was the private interest affected . . . ? It most assuredly was not the right to follow a chosen trade or profession . . . . Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer."[13]

As a fourth private interest, the tavernkeeper and his employees or agents have a constitutional right under the First Amendment to present non-obscene entertainment for their patrons. The licensee has a strong interest in assuring that his renewal application is not denied because local officials are offended by his entertainment policies. So long as the entertainers' performances are protected forms of expression under the First Amendment, local officials may not justify their actions on their own concepts of what is obscene. In *California v. LaRue*, — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), this Court declined to declare facially unconstitutional certain liquor license regulations which prohibited performances partaking of "gross sexuality" and also "some forms of visual representation which would not be found obscene." 34 L.Ed. 2d 352. While the decision upholds the enactment of such regulations, it also indicates that cer-

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[13] *See also, Willner v. Committee on Character*, 373 U.S. 96, 103 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951).

tain applications of the regulations would be unconstitutional. "[W]e agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression...." *Id.* Further, the Court anticipated possible unconstitutional applications of such sweeping license regulations.

> "Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram and Sons v. Hostetter,* [384 U.S. 35, 52 (1966)] is equally in point here: 'Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.'" *Id.* at n. 5.

Clearly, the Court in *LaRue* recognized that licenses could not be revoked and renewals could not be denied for performances within the constitutional protection of freedom of expression. What is required then to protect a tavernkeeper's First Amendment interest is adequate notice and a hearing procedure. For, "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." *Stanley v. Georgia,* 392 U.S. 557, 556 (1969). Precise procedures are needed which will adequately delineate protected activity from unprotected activity. "[T]he line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." *Speiser v. Randall,* 357 U.S. 513, 525 (1958); *see also, Freedman v. Maryland,* 380

U.S. 51, 58 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).[14]

In summary, appellees had several substantial interests which necessitated prior notice and a full hearing prior to the non-renewal decision: their interests in countering the allegations of bad moral character, their interest in protecting their property investments, their interest in pursuing their chosen careers, and their interest in exercising rights of free speech and expression.

The State's interests in granting only a summary, non-adversary hearing are in comparison quite insubstantial.

First, it is obvious that Kenosha city officials felt that the tavern operators and entertainment policies were undesirable and harmful to the community. The State and its municipalities may legitimately claim under the police powers that they have an interest in eliminating conduct harmful to the community morals. Yet, if this is an interest which the State claims is involved, several adequate, alternative remedies were available to prohibit the allegedly harmful conduct. Sections 280.09 and 280.10 Wis. Stats. (1971) permit the issuance of an injunction and abatement orders against places "used for the purpose of lewdness." This statutory device has been used as a quick and effective remedy by the State in the past where similar conduct has been considered offensive. *See, e.g., Marseo v. Cannon*, 326 F.Supp. 1315 (E.D. Wis. 1971); and *City of Cudahy v. DeLuca*, 49 Wis. 2d 90, 181 N.W. 2d 374 (1970). There are Wisconsin criminal

[14] Several courts have already held nude or semi-nude dancing in an entertainment or theatrical context to be protected. *See e.g. In Re Giannini*, 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968); *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (N.D. Ga. 1971); *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass. 1970).

statutes which prohibit the production or performance of an obscene performance, §944.21(1)(d), Wis. Stats. (1971), and prohibit public and indecent exposure of a sex organ, §944.20(2), Wis. Stats. (1971). The disorderly conduct statute, §947.01(1) Wis. Stats. (1971), which prohibits indecent conduct, could also be invoked in an emergency situation. *See, e.g., State v. Maker,* 48 Wis. 2d 612, 180 N.W. 2d 707 (1970). Finally, there are liquor license revocation procedures as opposed to non-renewal procedures which provide a municipality with an efficient remedy for terminating the license of any tavernkeeper who "keeps or maintains a disorderly or riotous, indecent or improper house." *See,* §§176.11 and 176.12, Wis. Stats. (1971).

Clearly, the State's interest in achieving a speedy or summary termination of appellees' licenses because of alleged harmful consequences for the community was not involved here at all. The State had many effective tools to prohibit any such harmful conduct; and it had the efficient revocation procedures at its disposal if needed. Yet the State chose to proceed under the renewal procedures which by statute necessarily extend over a three month duration. So the State cannot claim that it needed an adjudication of the appellees' renewal applications as quickly as possible to prevent harm to the community. While appellees' renewal applications were pending the State could have used alternative remedies at any time during April, May or June if the alleged injury to the community was so imminent.

As a second State interest in summary adjudication, appellant asserts that it would be inconvenient for some municipalities, especially the small ones, to hold renewal hearings. (Brief of Appellant, p. 36). It is argued that

they would be forced to hire hearing examiners and attorneys to handle the proceedings. This interest is both speculative and insubstantial. As noted in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency."

A third interest in summary adjudication, asserted by the State, is that the cost of providing renewal hearings at the municipal level would be so great as to discourage denials of licenses in many cases. (Brief of Appellants, p. 40). Again, the State's interest in avoiding additional cost is insubstantial. "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970), quoting from *Kelly v. Wyman*, 294 F.Supp. 893, 901 (S.D. N.Y. 1968). "Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540 (1971).

As the three-judge district court pointed out, problems of additional cost to the state and its municipalities can easily be avoided by "taxing 'costs' to the losing party, as is the practice in litigation before a court." *Misurelli v. City of Racine*, 346 F.Supp. 43, 48 (E.D. Wis. 1972). The requirement of a full hearing for tavernkeepers pending their renewal applications would not result in any extension of governmental benefits to persons who were subsequently determined to be ineligible for those benefits. Unlike the situation in *Goldberg v. Kelly, supra*, where the government is required to maintain assistance payments pending hearing to persons who may subse-

quently be determined ineligible for those payments, the tavernkeeper is by statute clearly entitled to the benefits of his liquor license pending his application. *Cf. Goldberg v. Kelly,* 397 U.S. 254, 266 (1970).

It is not unreasonable to urge that the State and its municipalities have an interest in extending prior notice and full hearing rights to tavernkeepers who question proposed denials of their renewal applications. A full and adequate hearing procedure will assure that liquor licenses are being held by persons of good moral character and responsibility in furtherance of the state public policy. *See, e.g., Stanley v. Illinois,* 405 U.S. 645, 655 (1972):

> "Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him."

As noted in *Misurelli v. City of Racine,* 346 F.Supp. 43, 48 (E.D. Wis. 1972):

> "If a legislative hearing may be more convenient, certainly the adversary hearing of the type we hold as required today better serves the state and city's interest in ascertaining the truth. None of the rights set forth in our opinion today preclude the gathering of information; rather the rights set forth, act to better insure that Racine will have the entire picture before it when it acts."

Full and open hearings into the proposed reasons for denying the application will also deter corrupt practices and governmental abuses in the dispensation of license privileges.

> "The possibility of high profits on the one hand and the danger of strict governmental limitations on the other hand create a fertile breeding ground for the temptations of graft, corruption, and other abuses

> of governmental office. If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that their expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby v. Allen*, 326 F. 2d 605, 609-610 (5th Cir. 1964).

Finally, full hearings in an adversarial context no doubt would tend to reduce the number of petitions for review filed in the state courts. If a litigant believes that the licensing authority did not give him an opportunity to prepare or did not hear all the evidence, and his license is not renewed, he will want to seek review from the courts. If he has received a full hearing, this concern will have already been satisfied. Adequate hearings at the administrative level will save the state additional costs by removing these cases from overburdened court dockets.

The decision to renew or not to renew a liquor license is not purely a legislative function, nor is it just an investigative function. The license committee and the common council are adjudicating the specific rights and liabilities of the tavernkeepers before them. Because their determinations necessarily involve an adjudicative process, prior notice and an adversary hearing are essential to afford due process of law. This is the directive announced in *Hannah v. Larche*, 363 U.S. 420, 442 (1960):

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that

those agencies use the procedures which have traditionally been associated with the judicial process."

B. Appellees were Deprived of Advance Notice of the Charges Against Them and Were Deprived of an Adversary Hearing Where They Could Confront and Cross-examine the Witnesses Against Them and Where a Verbatim Record of Sworn Testimony Could be Made.

Having balanced the interests of the licensees and the interests of the State, and having determined that the private interests of the licensees far outweigh any State interest in a summary, nonadversary procedure, the question remains of what process is due. The tavernkeepers sought only and the district court required only that the State follow "minimum procedural safeguards." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970).

Sections 176.05(1) and 176.05(8), Wis. Stats. (1971), have been authoritatively construed by the Wisconsin Supreme Court to permit municipalities to deny liquor license renewal applications after providing the tavernkeepers with only a legislative-type hearing. In *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 524, 157 N.W. 2d 568 (1968), the court stated:

> "Ruffalo argues that upon renewal he is entitled to a trial-type hearing upon his application under the due-process clause of the Constitution. *Hornsby v. Allen, supra.* However, the granting of a liquor license is a legislative function which does not require a trial-type hearing to comport with due process. From time immemorial, legislators and bodies exercising the legislative function have held the legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue. . . . A legislative type of hear-

ing does not include necessarily the right to cross-examine or require testimony to be given under oath." [15]

To some extent the tavernkeepers did receive "notice of the hearing" required in *Ruffalo*. Although they were never informed that any particular meeting was designed to be a hearing on their license applications, they were notified of a special meeting where the finance committee was to "interview" each licensee concerning his application. (R. 202) Perhaps then, for constitutional purposes, appellees were duly afforded notice of the pendency of the proceedings. *See, Robinson v. Hanrahan,* 409 U.S. 38, 39 (1972); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Moreover, each licensee was either personally present or represented by his attorney at the finance committee and common council meetings. So each tavernkeeper had an "opportunity to state his position on the issue." *State ex rel. Ruffalo v. Common Council, supra.* Under the standards established by the Wisconsin Supreme Court, appellees were not deprived of due process of law. However, appellees submit that the license renewal procedures were constitutionally defective in several respects.

First, the tavernkeepers quite obviously were denied advance notice of the accusations or complaints against them. While appellees were well aware of the nature

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[15] The construction of the State statute by the Wisconsin Supreme Court is, of course, binding upon this Court. "[T]he Wisconsin Court has spoken and, by majority vote, has construed the State statute then in effect in that very way. Construction of the statute is the State court's task. It is not our task. And we are bound by the Wisconsin Court's decision as to the meaning and application of a Wisconsin statute." *Groppi v. Wisconsin,* 400 U.S. 505, 513 (1971) (Blackmun, J. concurring). *See also, Gooding v. Wilson,* 405 U.S. 518, 520 (1972), and *Seagram & Sons v. Hostetter,* 384 U.S. 35, 51, 52 (1966).

of their tavern entertainment, they had no reason to know that the proposed basis for denying their applications was because they had "defiled the reputation of the city;" furnished "an atmosphere conducive to prostitution . . . setting improper moral standards for the children in [the] community;" that law enforcement problems had increased and that police department records indicated "that parking and litter problems around the area and crimes of a violent nature [had] escalated. . . . " Nor had they been made aware that there had been increased police surveillance proving "costly to the taxpayers of the city," or that the live entertainment which they offered was "not attractive to new industry . . . coming into the community," nor that it "attracts an undesirable element from other cities. . . ." (R. 211) Yet these were the official reasons given for denying their applications. The State suggests that there was no notice problem at any time during this dispute since the tavernkeepers did not deny that they offered nude dancing entertainment at their establishments. (Brief of Appellants, p. 35, 39) The State plainly overlooks the fact that the dispute was not about nude dancing at the taverns but instead was about the alleged social ills and harmful consequences to the community which resulted from the tavern entertainment. The complainants against the licensees accused them of causing a long list of harms to the community. And the Common Council's decision to deny the applications was based solely (at least officially) upon that list. Yet at no time prior to either the finance committee meetings or the Common Council meetings, had the tavernkeepers been given notice of the list of complaints against them.[16]

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[16] It should also be noted that the licensees were never given notice of the rules that would be followed during the committee meetings or the Council meetings. Most importantly, appellees were never told

Due process required not only that the tavernkeepers be given notice of the pendency of the proceedings, but also that they be notified of the nature of the complaints or accusations against them.

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan v. United States*, 304 U.S. 1, 18-19 (1938)[17]

Notice of the reasons urged for denial is particularly necessary where considerable discretion resides in the decision maker, and where the reasons for denial may be so wide-ranging and vague. In *Morgan v. United States, Id.* at 21, the Court also noted:

> "[T]he breadth of the secretary's discretion under our rulings applicable to such a proceeding . . .

(continued)
which decision-making body, the finance committee or the Common Council, would make the final decision on the renewal applications. Section 176.05(8), Wis. Stats. (1971), provides in pertinent part: "All town and village boards and common councils, or the duly authorized committees of such councils, shall meet . . . for the purpose of acting upon such applications for license (*sic*), as may be presented to them. . . ." The State statute apparently contemplates a delegation of final licensing authority to common council committees, if the councils so choose. Consequently, appellees entered the Kenosha city hall on four occasions not only without knowledge of the commitee and council rules on applications, but also without knowledge of which body would make the final decision on the applications.

[17] *Accord, Morrissey v. Brewer*, 408 U.S. 471, 487 (1972); *Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> [citations omitted] places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them. . . ."

Appellees were also denied effective rights of confrontation and cross-examination. The list of reasons prepared by the finance committee for rejecting the license applications reveals the degree to which the committee and the common council relied upon rumors and speculative assertions proffered by the few witnesses. The vague and unsupported accusations leveled at the licensees that they had contributed to prostitution, increased parking and litter problems, attracted undesirable elements from other cities, set improper moral standards for children and escalated crimes of a violent nature in the city are perfect examples of charges which the accused should be permitted to counter by cross-examination and confrontation of the witnesses. As stated by this Court in *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections and the requirements of confrontation and cross-examination. They have

> ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." [18]

The lower court also ruled that the statements of witnesses at the renewal hearings should be under oath and recorded verbatim. "An applicant has a right to be safeguarded from license denial by deceit. Testimony under oath acts to ensure truthful testimony, and a verbatim transcript acts to ensure against arbitrary denials." *Misurelli v. City of Racine,* 346 F. Supp. 43, 50 (1972). These legal protections have been approved by this Court as well. In *Morrissey v. Brewer,* 408 U.S. 471, 484 (1972), the following was noted: "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on *verified* facts. . . ." (Emphasis supplied.) In *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970), the Court stated that "a complete record and a comprehensive opinion, . . . would serve primarily to facilitate judicial review and to guide future decisions. . . ." [19]

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[18] *See also, Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 268-269 (1970); *Willner v. Committee on Character,* 373 U.S. 96, 103 (1963); *Reilly v. Pinkus,* 338 U.S. 269, 276 (1949).

[19] The Court also noted that such a requirement would be unnecessary at a pre-termination hearing stage since a full-fleged trial-type hearing is given subsequent to the termination of benefits. Therefore, the need for a complete record in the present situation is all the more apparent because the liquor licensees are not entitled to a full, trial-type hearing on the reasons for denying their applications subsequent to the municipality's decision.

Moreover, the utility of a verbatim record for assisting appellate review is well demonstrated in the decisions in *Greene v. McElroy,* 360 U.S. 474 (1959) and *Morgan v. United States,* 304 U.S. 1 (1938). Without the lengthy verbatim records in those cases, the process of appellate review would have been far more difficult, if not impossible. In the present case it is impossible to know what transpired at the finance committee meetings. The opportunity for effective appellate review is thus severely limited.

Appellees do not demand unreasonable procedures. They merely request the same "minimum procedural safeguards" cited by this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970).

C. Due Process Requires a Full Hearing on the Merits Prior to a Ruling on the License Application; Subsequent Court Remedies Are Inadequate.

The State suggests that the full hearing which appellees seek, if required, need not precede the administrative ruling on the renewal applications. Instead, the full hearing, it is suggested, can be obtained by court review. (Brief of Appellants, pp. 37-41.) Yet the State admits that an applicant would only have a limited right of review. Under the State's proposed plan, an applicant would never get a full hearing on the merits. The State relies on the very decision, *State ex rel. Ruffalo v. Common Council,* 38 Wis. 2d 518, 525, 157 N.W. 2d 571 (1968), which describes the limited right of court review:

> "The reviewing court cannot substitute its judgment for the legal discretion of the Common Council on the merits of the application or review the adequacy of the grounds for its decision other than in the

> context of determining whether the action of the licensing authority was arbitrary, capricious or discriminatory." [20]

Moreover, the suggestion that any possible deprivation of rights following an abbreviated hearing before municipal officials can be cured by subsequent court review has been firmly rejected. "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois,* 405 U.S. 645, 647 (1972). Also, a process that would compel the aggrieved licensee to seek review in order to obtain a full hearing on the merits effectively shifts the burden of proof from the State to the person aggrieved. This burden would not have been imposed upon him had the State given him adequate procedures initially. *See, Armstrong v. Manzo,* 380 U.S. 545, 551 (1965).

Because a reviewing court does not provide a full hearing subsequent to the denial of a renewal application, it is imperative that a full hearing on the merits be held prior to any decision on the application. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

> "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of

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[20] The same court stated in *Common Council of Oshkosh v. State,* 59 Wis. 423, 428-429, 18 N.W. 324 (1884): "It would be clearly irregular and improper to admit the proposed testimony on the hearing of the writ of *certiorari.* That writ was intended to review the proceedings of the common council to ascertain whether they had been according to law. This is its scope and object. It does not give a new trial in the court reviewing the proceeding or perform the office of an appeal in any sense."

> the case' *before* the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971). [Emphasis in original.][21]

The State has not claimed that the municipalities were confronted with an emergency situation. Moreover, the fact that the license applications were pending from April until June of 1971 without any attempt by the city officials to revoke the liquor licenses indicates that there was no emergency. Therefore, an effective prior hearing was required.

III. ABSTENTION BY THE DISTRICT COURT WAS NOT APPROPRIATE BECAUSE THE STATE STATUTE HAD ALREADY BEEN AUTHORITATIVELY CONSTRUED BY THE STATE SUPREME COURT AND WAS NOT AMBIGUOUS.

The State suggests that the district court should have abstained from ruling on the constitutionality of the state statute. Although it recognizes that the Three-Judge Court Act (28 U.S.C. §2281, *et seq.*) was purposely enacted to permit federal court injunctions against the enforcement of state statutes, the State nevertheless contends that the district court should have stayed its hand in this dispute. The State, however, fails to offer any grounds justifying the application of the abstention doctrine. First of all, there can be no claim that the state statute is ambiguous on the issues raised herein. Any ambiguities in the statute were resolved by the decision in *State ex*

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[21] *Accord, Boddie v. Connecticut,* 401 U.S. 371, 379 (1971); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 (1969); *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1949); *Opp Cotton Mills v. Administrator,* 312 U.S. 152, 153 (1941).

rel. Ruffalo v. Common Council, 38 Wis. 2d 518, 157 N.W. 2d 568 (1968), where the Wisconsin Supreme Court ruled that §§176.05(1) and 176.05(8), Wis. Stats. (1971), do not encompass trial-type hearing procedures. The situation, therefore, is strikingly similar to that found in *Wisconsin v. Constantineau,* 400 U.S. 433, 438-439 (1971):

> "But the abstention rule only applies where 'the issue of state law is uncertain.' [Citation omitted.] Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. [Citations omitted.]
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> "In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. . . . [A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the Federal Court should not abstain but should proceed to decide the Federal Constitutional claim."

Second, as far as the Kenosha tavernkeepers are concerned, this is not a situation where the decision of the federal district court in any way interfered with an ongoing state court action involving the parties. The cautionary doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) is inapplicable. State court proceedings concerning the denial of the Kenosha appellees' liquor license applications were *not* pending at the inception of this lawsuit or at any time during the lawsuit. Thus, the *Younger* doctrine of equity practice and comity is inapplicable, and abstention does not apply. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498 (1972). Absent special

circumstances it was the duty of the district court to give due respect to appellees' choice of a federal forum for the hearing and decision of their federal constitutional claims. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

CONCLUSION

For the foregoing reasons appellees respectfully urge this Court to affirm the order of the district court declaring §§176.05(1) and 176.05(8) of the Wisconsin Statutes to be unconstitutional and enjoining the operation of the statutes insofar as they permit the renewal of liquor licenses to be denied without permitting the applicants an opportunity for notice and an adversary-type hearing.

Respectfully submitted,

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